IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
October 30, 2007 Session

STATE OF TENNESSEE v. GERALD GIFFORD

Appeal from the Criminal Court for Hamilton County
No. 248326 Don W. Poole, Judge

No. E2006-02500-CCA-R3-CD - April 23, 2008

The Appellant, Gerald Gifford, appeals the Hamilton County Criminal Court's order denying his motion to compel expungement of criminal charges, which was filed after the successful completion of the imposed diversionary period. Under the terms of a plea agreement, Gifford pled guilty to three counts of Class E felony reckless endangerment and to one count of DUI, which were unrelated but permissibly joined in a single indictment. As provided by the plea agreement, Gifford was sentenced to eleven months and twenty-nine days, with jail service of forty-eight hours for the DUI. The proceedings for felony reckless endangerment were deferred for a period of one year, in conjunction with one year of supervised probation, as provided by the judicial diversion statute. After completion of the probationary period, Gifford requested expungement of the three reckless endangerment charges. Although unopposed by the District Attorney's office, the trial court denied expungement relying upon a 2006 Attorney General's opinion, which opined that, under the amended provisions of Tennessee Code Annotated section 40-32-101(a)(1) (2003), when a defendant is convicted of at least one count in a multi-count indictment, expungement of the records relating to all remaining counts in the indictment is precluded. In sum, the trial court held that because Gifford was convicted of DUI, expungement of the reckless endangerment charges was not permitted, notwithstanding successful completion of the diversion period. After review, we conclude that the provisions of Tennessee Code Annotated section 40-32-101(a)(1), while clearly prohibiting expungement of the greater indicted offense when a defendant is convicted of a lesser offense within the same count, does not preclude expungement of all other counts in the indictment. Moreover, we conclude that because the amended provision of Tennessee Code Annotated section 40-32-101(a)(1) requires that a defendant be "convicted of any offense or charge," (emphasis added), the amended provision has no application to the expungement of records in a program of diversion. Accordingly, we remand to the trial court for entry of an order requiring expungement of all records relating to the three reckless endangerment charges.

Tenn. R. App. P. 3; Judgment of the Criminal Court Reversed and Remanded

DAVID G. HAYES, J., delivered the opinion of the court, in which DAVID H. WELLES and D. KELLY THOMAS, JR., JJ., joined.

John Allen Brooks, Chattanooga, Tennessee, for the Appellant, Gerald Gifford.

Robert E. Cooper, Jr., Attorney General and Reporter; John H. Bledsoe, Assistant Attorney General; William H. Cox, District Attorney General; and Neal Pinkston, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Procedural History

On March 3, 2004, a Hamilton County grand jury returned an eleven-count indictment against the Appellant. On March 17, 2005, the Appellant pled guilty, under the terms of a plea agreement, to Counts 8-10, each charging Class E felony reckless endangerment, and to Count 11, charging DUI, first offense. The agreement provided that the Appellant was to receive a sentence of eleven months and twenty-nine days, to be suspended after service of forty-eight hours in jail for the DUI conviction. The agreement also specified that the Appellant was pleading guilty to the reckless endangerment counts pursuant to Tennessee Code Annotated section 40-35-313, the judicial diversion statute, and that following a one-year supervised probationary period, the records of these charges would be expunged. The record indicates that the DUI charge and the reckless endangerment charges were unrelated, occurring "separate in time and place," with the counts being permissibly joined in the indictment. *See* Tenn. R. Crim. P. 8. The agreement further provided that Counts 1-7 of the indictment would be dismissed.

The Appellant successfully completed his probationary period and submitted a request to the Hamilton County Criminal Court Clerk for expungement of the records relating to the three felony reckless endangerment charges. The Clerk informed the Appellant that she was unable to expunge the records based upon Attorney General Opinion 06-003. On March 28, 2006, the Appellant filed a motion to compel the Clerk to expunge the charges or, in the alternative, that he be permitted to withdraw his guilty pleas. On April 10, 2006, the trial court entered an order requiring expungement of the records. On April 20, 2006, the Clerk of the Criminal Court "approached the Court and had an order signed by [the] Court" rescinding the expungement order. In May 2006, the Appellant filed a second motion to compel expungement and requested a hearing on the matter, which was held on August 30, 2006. At the hearing, the Chief Deputy Clerk testified that, based upon Attorney General's Opinion 06-003, which interpreted an amendment to Tennessee Code Annotated section 40-32-101, she was unable to expunge the records because the opinion stated that when a defendant is convicted of at least one count in a multi-count indictment, expungement of the records relating to all remaining counts in the indictment is precluded. At the hearing, the District Attorney General's office did not oppose the Appellant's motion for expungement of the records. The trial court took the matter under advisement and, on October 24, 2006, issued an order denying the Appellant's request to expunge the records of the felony reckless endangerment charges. The Appellant timely filed a Notice of Appeal/Petition for Writ of Certiorari.

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Analysis

On appeal, the Appellant presents for review the legal issue of whether the expungement statute, Tennessee Code Annotated section 40-32-101(a)(1), as amended by the Acts of 2003, precludes expungement of the public records of criminal proceedings, which have been dismissed, when a defendant is convicted of at least one other count within a multi-count indictment.

Initially, we address the State's argument that the appeal should be dismissed because the Appellant does not have an appeal as of right from the trial court's order denying the motion for expungement and that the Appellant's issue does not qualify for review under the common law writ of certiorari. Tennessee Rule of Appellate Procedure 3(b) enumerates those situations in which a defendant in a criminal action may appeal as of right, and we agree with the State that the rule does not contemplate an appeal as of right from the denial of an expungement petition. *See* Tenn. R. App. P. 3(b); *see also State v. Adler*, 92 S.W.3d 397 (Tenn. 2002). However, in *Adler*, our supreme court allowed an appeal of this identical issue pursuant to the common law writ of certiorari. *Id*. at 401-03.

The common law writ of certiorari has been codified at Tennessee Code Annotated section 27-8-101 and provides:

> The writ of certiorari may be granted whenever authorized by law, and also in all cases where an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction conferred, or is acting illegally, when, in the judgment of the court, there is no other plain, speedy, or adequate remedy. This section does not apply to actions governed by the Tennessee Rules of Appellate Procedure.

T.C.A. § 27-8-101 (2006). The State argues that the writ is not proper in this case because the trial court did not exceed its jurisdiction or otherwise act illegally. However, after review, we conclude that the common law writ is proper because the record reveals that the issue presented involves an allegation that the trial court acted without legal authority in refusing expungement and because there is no other "plain, speedy, or adequate remedy." Accordingly, we treat the Appellant's petition as a writ of certiorari and review the issue raised. *See* T.C.A. § 27-8-101; *Adler*, 92 S.W.3d at 401.

The indictment alleged that the Appellant's crimes of reckless endangerment, which were to be expunged, occurred on June 27, 2003. The procedural requirements for the destruction of public records following dismissal or acquittal of criminal charges, commonly referred to as the expungement statute, is codified at Tennessee Code Annotated section 40-32-101. On the date of the Appellant's alleged unlawful conduct, Tennessee Code Annotated section 40-32-101(a)(1) provided as follows:

> All public records of a person who has been charged with a misdemeanor or a felony, and which charge has been dismissed, or a no true bill returned by a grand jury, or a verdict of not guilty returned by a jury, and all public records of a person who was arrested and released without being charged, shall, upon petition by that person to the court having jurisdiction in such previous action, be removed and destroyed without cost to such person; however, the cost for destruction of records shall apply where

> the charge or warrant was dismissed in any court as a result of the successful completion of [a] diversion program . . .; provided, however, that when a defendant in a case has been convicted of any offense or charge, including a lesser included offense or charge, the defendant shall not be entitled to expungement of the records or charges in such case pursuant to this part.

T.C.A. § 40-32-101(a)(1) (2003). The above underlined portion of subsection 101(a)(1), which is the focus of this appeal, was amended effective May 22, 2003.[1]

The 2003 Amendment to Tennessee Code Annotated section 40-32-101 was enacted by the General Assembly in response to our supreme court's decision in *Adler*. In that case, the defendant, Adler, was charged in a single-count indictment for the crime of aggravated child neglect of a child under six years of age, a Class A felony, and, following a jury trial, was convicted of the lesser offense of reckless endangerment, a Class A misdemeanor. In accordance with the expungement statute in effect at the time, the defendant sought expungement of all records relating to his Class A felony indictment. Our supreme court held that "a defendant who is convicted of a lesser-included offense of the offense sought in the indictment or presentment is entitled to have the record expunged of any greater charge(s) for which the jury finds the defendant not guilty." *Adler*, 92 S.W. 3d at 403. This decision was released on December 30, 2002, and, on May 22, 2003, Public Chapter 175 was enacted amending the expungement statute precluding expungement of the records "when a defendant in a case has been convicted of any offense or charge including a lesser included offense or charge." T.C.A. § 40-32-101(a)(1).

The authority relied upon by the trial court for denying expungement, and the authority advanced on appeal, is contained in Attorney General Opinion No. 06-003 dated January 5, 2006. The relevant portion is recited as follows:

> Effect of Public Chapter No. 175 of the Acts of 2003 on the Expungement of Records in Multi-County Criminal Indictments
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> **QUESTION**
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> Where a defendant is convicted of at least one count in a multi-count indictment, does Tenn. Code Ann. § 40-32-101(a)(1), as amended by Public Chapter No. 175 of the Acts of 2003, preclude the expungement of records relating to all counts in that indictment?
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> **OPINION**

[1] The expungement statute was again amended in 2006, but we agree with the State that "the 2006 Amendment, [relative to the issue before us] is not legally distinguishable from the 2003 Amendment."

> Yes. The plain language of section 40-32-101(a)(1), as amended by Public Chapter No. 175, prohibits the expungement of records of charges "in such case" where a defendant has been convicted of "any offense or charge."

We respectfully disagree with the Attorney General's interpretation of the language of the 2003 amended statute. The Attorney General opines that the plain language of the term "case" or "in such case," as used in the statute, refers to the indictment as a whole, and, as such, a multi-count indictment constitutes but a single case. However, it is fundamental that each count of an indictment represents a separate criminal charge, or case, and that a conviction under each count of the indictment requires a separate judgment of conviction. In *State v. Russell*, 800 S.W.2d 169, 172 (Tenn. 1990), our supreme court, citing *Usary v. State*, 112 S.W.2d 7 (1938), observed that "[e]ach count in an indictment is, in legal contemplation, a separate indictment; each count must be a complete indictment in itself." As such, we construe the term "case" to mean each individually numbered count or criminal offense alleged within the indictment. Thus, a multi-count indictment represents multiple criminal cases.

A principle of statutory construction requires that the reviewing court must construe a statute's language in the context of the entire statute and in light of the statute's general purpose. *State v. Fleming*, 19 S.W. 3d 195, 197 (Tenn. 2000). It is undisputed that the 2003 Amendment was enacted in response to the *Adler* decision. As noted *supra, Adler* addressed expungement only in the context of when a defendant is convicted of a lesser-included offense. Moreover, review of the legislative history reflects only the consternations of the circuit court clerks in effecting expungement of the public records when a conviction for a lesser-included offense is returned.[2]

Although the trial court denied the Appellant's request for expungement of the records, in its order of denial, the court, nonetheless, noted the following incongruent result which could occur based upon adherence to the Attorney General's Opinion:

> In a question by the Court to the Chief Deputy [Clerk] as to whether a defendant in a six (6) count indictment being charged with murder, rape, armed robbery, kidnapping, burglary, and speeding was found guilty of speeding with the other five (5) counts dismissed, could the five (5) counts or cases, charging murder, rape, armed robbery, kidnapping and burglary be expunged. She responded, "No."

As illustrated by this hypothetical, joinder of a speeding violation, which results in a conviction, would preclude expungement for charges of murder, rape, robbery, kidnapping, and burglary, although the defendant is acquitted of these charges. Joinder of offenses within a single

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[2] Senate Bill 879, April 1, 2003:

> [Senator Ramsey]: This bill comes to me from my local circuit court clerk and is based on a supreme court decision [*Adler*] . . . what happened in that case was a defendant was convicted of a lesser offense than what he was charged, and then the court ordered that the public records be expunged after that. . . .

indictment, as a general matter, is determined by the practice of the local district attorney general, and this policy varies from district to district. As such, under these circumstances, the entitlement to expungement would rest, not through the application of a uniform statute, but, rather at the discretion of the district attorney in the drafting of the indictment. We do not believe the legislature intended this result. To do so violates the principle that a statute should not encourage arbitrary or discriminatory enforcement. *State v. Lakatos*, 900 S.W.2d 699, 701 (Tenn. Crim. App. 1994).

In summary, we acknowledge that our primary role is to ascertain and give effect to the legislative intent without unduly restricting or expanding the statute coverage beyond its intended scope. *Owens v. State*, 908 S.W.2d 923, 926 (Tenn. 1995). In application of the above principles, we construe the term "case" in Tennessee Code Annotated section 40-32-101(a)(1) to mean each separate count of the indictment.

Moreover, although not addressed by either party, the Appellant in this case pled guilty to three counts of felony reckless endangerment as lesser-included offenses of aggravated assault, which was charged in Counts 8, 9, and 10 of the indictment. As concluded *supra*, the amended statute was intended only to address expungement of an offense charged in an indictment following conviction of a lesser-included offense. The plain language of the statute precludes expungement only when a defendant in a case has been convicted . . ." T.C.A. § 40-32-101(a)(1) (emphasis added). Because judicial diversion does not involve a conviction, as no adjudication of guilt is entered, the amendment provisions of Tennessee Code Annotated section 40-32-101(a)(1) have no application to the expungement of records in a program of diversion.

CONCLUSION

Based upon the foregoing, the judgment of the Hamilton County Criminal Court is reversed. Because the Appellant has successfully completed the required period of diversion, the case is remanded to the trial court for discharge of the proceedings against the Appellant and for an order of expungement of all public records relating to the three charges of felony reckless endangerment as provided by statute.

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DAVID G. HAYES, JUDGE